Filed 9/29/09 In re Cesar S. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE CESAR S., a Person Coming Under the Juvenile Court Law.	H034097 (Santa Clara County Super. Ct. No. JV35509A)
THE PEOPLE, Plaintiff and Respondent, v. CESAR S., Defendant and Appellant.	

The minor, Cesar S., admitted that he committed an assault for the benefit of a criminal street gang (Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (b)(1)). On April 6, 2009, the juvenile court ordered that he be committed to the enhanced ranch program for six to eight months, set the maximum time of confinement at seven years, and awarded 58 days of predisposition custody credits. The court also ordered the minor to pay a fine and penalty assessments of $146.

On appeal, the minor contends that there is not substantial evidence to support a finding that he has the ability to pay the fine and penalty assessments of $146. The minor

argues that even if there is sufficient evidence, the juvenile court "failed to consider the issue" of whether he had the ability to pay. The minor also asserts that the court should have awarded him five additional days of "precommitment time."

For reasons that we will explain, we will modify the April 6, 2009 order by adding 5 days of predisposition custody credits and affirm the order as so modified.

BACKGROUND

On February 5, 2009, a petition under Welfare and Institutions Code section 602[1] was filed in San Mateo County Superior Court against the minor, who was then 17 years old, alleging that he committed an assault by means of force likely to produce great bodily injury and personally inflicted great bodily injury upon the victim, a non-accomplice (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a); count 1). The petition also alleged that the minor committed a battery with serious bodily injury for the benefit of a criminal street gang (Pen. Code, §§ 243, subd. (d), 186.22, subd. (b)(1); count 2). According to the probation officer's report, which was based on a police report, the minor and his companions confronted the victim on January 29, 2009. One of the minor's companions repeatedly asked the victim whether he " 'banged.' " The minor punched the victim, who suffered a broken jaw and two broken teeth. The victim believed "some sort of metal object" may have been used when he was punched. The minor stated that he and his companions are Norteño gang members. He also expressed a dislike of Sureños and indicated that he thought the victim was a Sureño and for that reason they "went after" him.

A probation officer's detention report was filed on February 5, 2009, stating that the minor had "one prior referral" in October 2008 for assault and battery and was placed on informal probation in November 2008.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On February 6, 2009, a new petition under section 602 was filed in San Mateo County Superior Court against the minor, alleging that he committed a misdemeanor battery (Pen. Code, § 242). According to a probation officer's report, which was based on a police report, the minor hit the victim in the face on September 30, 2008.

In March 2009, a gang allegation (Pen. Code, § 186.22, subd. (b)(1)) was added to the assault count in the February 5, 2009 petition. The minor admitted that he committed the assault and admitted the gang allegation in the February 5, 2009 petition. The remaining counts and allegations in the February 5, 2009 and February 6, 2009 petitions were dismissed, but were to be considered true for disposition.

The matter was transferred to Santa Clara County for disposition and further proceedings. The contested disposition hearing was held April 6, 2009. After receiving evidence and hearing argument from the parties, the juvenile court stated that it had "read and considered the probation officer's report" and that it was "going to adopt the recommendations of the probation officer in their entirety." The court continued the minor as a ward of the court and ordered, among other things, that he be committed to the Santa Clara County Juvenile Rehabilitation Facilities' enhanced ranch program for six to eight months, that upon successful completion of the program he be returned to the custody of his parents on probation, and that he register pursuant to Penal Code section 186.30. The court determined the assault to be a felony, set the maximum time of confinement at seven years, and gave the minor credit for time served of 58 days.

Among the probation officer's recommendations, as adopted by the court, were: "That the minor attend school, vocational training, or maintain full-time employment if in compliance with the mandates of the California Education Code"; "The minor and his/her parent(s)/guardian(s) are presumed jointly and severally responsible for the payment of restitution, fines, or penalty assessments . . . (WIC 730.7)"; "That the minor be ordered to pay [the victim] restitution for losses sustained; the specific amount and terms of payment to be ordered"; that the "minor be ordered pay a Restitution Fine [of] $110; said

fine to be paid in full on or before the end of Probation"; and that the "minor be ordered to pay to the General Fund a fine and Penalty Assessments totaling $146; said fine and penalty assessments to be paid in full by the end of Probation and that it be found that said minor has the financial ability to pay; . . ."

Near the conclusion of the disposition hearing, the juvenile court questioned the minor's parents about their ability to pay and made a finding that they have the ability to pay fines and fees. The court then referred them "to the Department of Revenue for a payment plan." The court subsequently ordered $300 in attorney fees and scheduled a restitution setting hearing.

On April 8, 2009, the minor filed a notice of appeal.

DISCUSSION

On appeal, the minor contends that there is not substantial evidence to support a finding that he has the ability to pay the fine and penalty assessments of $146. Even if there is sufficient evidence, the minor argues that the juvenile court "failed to consider the issue" of whether he had the ability to pay. The minor also asserts that the court should have awarded him 63 days of "precommitment time," rather than only 58 days.

Fine and Penalty Assessments

Preservation of Objections

As an initial matter, the minor acknowledges that he did not object to the fine and penalty assessments of $146 in the juvenile court. On appeal, he asserts that "no objection was necessary in order to preserve [his] sufficiency of the evidence claim." Regarding his other claim on appeal – that the juvenile court failed to consider whether he had the ability to pay – the minor contends that "a pure issue of law may be presented for the first time on appeal," "an appellate court always has the discretion to review a claim of sentencing error regardless of the lack of an objection in the trial court," and "if the issue is forfeited, it is manifest that [the minor] will have been deprived of his right to the effective assistance of counsel."

In the context of a restitution order under section 730.6, this court has rejected the contention that a challenge based on sufficiency of the evidence must be raised by the minor in the juvenile court in order to preserve the issue for appeal. (*In re K.F.* (2009) 173 Cal.App.4th 655, 660-661; cf. *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 [regarding attorney fees under Penal Code section 987.8, "no predicate objection in the trial court" is required to challenge the sufficiency of the evidence regarding a defendant's ability to pay].) Consistent with *In re K.F., supra,* we will assume that the minor's argument in this case concerning the sufficiency of the evidence is not forfeited.

With respect to the minor's argument that the juvenile court failed to consider whether he had the ability to pay, we will address the merits of the issue in response to his contention that the failure of his counsel to assert an objection on this ground below constituted ineffective assistance.

Substantial Evidence Supports an Ability-to-Pay Finding

At the disposition hearing, the juvenile court adopted the probation officer's recommendations that the minor be ordered to pay a fine and penalty assessments of $146 and that the minor be found to have the financial ability to pay. On appeal, the minor argues that "there is absolutely no evidence that [he] had the wherewithal to pay the fine." He argues that a "probation report reveals that [he was] 17 years old and 'ha[d] never held formal employment,' " and that the record is "entirely silent regarding any funds which might be available to" him.

Neither the juvenile court nor the probation officer specified the statutory basis for the fine and penalty assessments. On appeal, the minor asserts that the fine and penalty assessments of $146 may have been imposed under section 730.5 or section 731, subdivision (a)(1). The Attorney General assumes that the court imposed the amount pursuant to section 730.5 because that section, but not section 731, subdivision (a)(1), provides for penalty assessments. The minor responds that "there is no reason to believe that [section 731, subdivision (a)(1)] is exempt from [penalty] assessments."

We need not decide whether penalty assessments may be imposed on a fine under section 731, subdivision (a)(1). In this case, the minor is challenging the sufficiency of the evidence to support a finding that he had the ability to pay the fine. Both section 730.5 and section 731, subdivision (a)(1) require an ability-to-pay finding by the court. Section 730.5 states in relevant part that "[w]hen a minor is adjudged a ward of the court on the ground that he or she is a person described in Section 602, . . . the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense, *if the court finds that the minor has the financial ability to pay the fine*. . . ." (*In re Steven F.* (1994) 21 Cal.App.4th 1070, 1079 (*Steven F.*), italics added [section 730.5 "by its terms requires the court to first find the minor has the ability to pay the fine"].) Section 731, subdivision (a)(1) provides that "[i]f a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602, the court may . . . . [¶] (1) Order the ward to make restitution, to pay a fine up to two hundred fifty dollars ($250) for deposit in the county treasury *if the court finds that the minor has the financial ability to pay the fine*, or to participate in uncompensated work programs." (Italics added.) As both sections contain identical language concerning an ability-to-pay finding, we turn to the question of whether there was sufficient evidence to support such a finding in this case.

"Ability to pay does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785 (*Staley*).) A court may consider the party's ability to earn money by obtaining employment in the future. (*Id.* at pp. 785-786; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.)

An ability-to-pay finding must be supported by substantial evidence. (Cf. *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347, 351 [trial court's determination that the defendant had the ability to pay attorney fees under Penal Code section 987.8 was not supported by substantial evidence]; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920 [same].) Substantial evidence is evidence that is reasonable, credible and of solid value,

such that a rational trier of fact could have found the minor had the financial ability to pay the fine. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In this case, according to a report filed by the probation officer in San Mateo County Superior Court in February 2009, the minor, who was nearly two months away from his 18th birthday, had "never held formal employment." However, the minor's parents indicated to the probation officer that they wanted the minor to live primarily at the father's residence in Santa Clara County, and the minor's father stated that his "rules" for the minor would include the minor attending school every day and going to the father's "work after school and work[ing] with him."

Reports filed thereafter in Santa Clara County Superior Court reflect the minor's belief in March 2009 that "he should be responsible for paying restitution to the victim." Further, the minor's father indicated that "[h]e plans to see his son completing high school, or if at eighteen years of age, [the minor] does not want to continue his schooling, he will have [the minor] work with him." The probation officer, in recommending that the minor be committed to the enhanced ranch program for six to eight months, explained that the minor would, among other things, "be able to work towards completing high school" while at the "Ranch." The minor would also "receive intensive services in the community to assist him in becoming a contributing member of society" after his "release from the Ranch."

At the contested disposition hearing in April 2009, the minor's father testified that he owns his own business, a machine shop. He stated that if the minor was released to his custody, he would expect the minor to work and the minor would work with him. He would also ensure that the minor followed the court's orders, including getting an education if that was expected. The minor's mother testified that the minor had stated that he would like to be an x-ray technician.

In view of the amount of the fine and penalty assessments imposed ($146), the minor's age (nearly 18 years old), his desire to work, and the opportunity for him to work

at his father's business, we determine that substantial evidence supports a finding that the minor has the ability to earn wages and to pay the ordered fine and penalty assessments after completing the enhanced ranch program.

The minor argues on appeal that the reference to a "financial" ability to pay (§§ 730.5, 731, subd. (a)(1)) suggests that the Legislature intended a court to determine "whether the minor *presently* has the necessary funds" (italics added) rather than also considering the minor's *future* ability to pay.

We find the minor's argument unpersuasive. We observe that Penal Code section 987.8, regarding the cost of legal assistance, and Penal Code section 1203.1b, regarding probation costs, define "ability to pay" as including the defendant's "*present financial* position," "reasonably discernible *future financial* position," and "[a]ny other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs . . . ." (Pen. Code, §§ 987.8, subd. (g)(2)(A), (B) & (D), italics added; see 1203.1b(e)(1), (2) & (4).) Thus, where the Legislature has expressed an intent that the court consider a time frame, it has included, *along with* the term "financial," other terms, such as "present" or "future," to reflect the intended time frame. We therefore disagree with the minor that the use of the term "financial," standing alone, precludes the juvenile court from considering the minor's future ability to pay.

We find further support in *Staley*, where the Court of Appeal considered the defendant's ability to pay a drug program fee under Health and Safety Code section 11372.7. (*Staley*, *supra*, 10 Cal.App.4th at pp. 785-786.) Health and Safety Code section 11372.7, subdivision (b) states: "The court shall determine whether or not the person who is convicted of a violation of this chapter has the *ability to pay* a drug program fee. If the court determines that the person has the ability to pay, the court may set the amount to be paid and order the person to pay that sum to the county in a manner that the court believes is reasonable and compatible with the person's *financial ability*. In its determination of whether a person has the ability to pay, the court shall take into

account the amount of any fine imposed upon that person and any amount that person has been ordered to pay in restitution. If the court determines that the person does not have the ability to pay a drug program fee, the person shall not be required to pay a drug program fee." (Italics added.)

Although Health and Safety Code section 11372.7, subdivision (b) refers to both the "ability to pay" and the "financial ability" of the defendant, the Court of Appeal in *Staley* determined that "[a]bility to pay does not necessarily require existing employment or cash on hand." (*Staley*, *supra*, 10 Cal.App.4th at p. 785.) Consistent with *Staley*, we conclude that the reference to a minor's "financial" ability to pay (§§ 730.5, 731, subd. (a)(1)) does not preclude consideration of the minor's future ability to pay.

The minor also argues that, although his father testified that he could work at the machine shop, his father did not testify that he "would be paid for his labor. Thus, there is quite simply no evidence that [the minor] would have the wherewithal to pay the fine."

We observe that the minor's father testified that the minor would be expected "to work" if released to the father's custody, and that the minor would "work" with his father. The trial court may reasonably infer from this testimony that the minor would be paid for his labor. The father never testified that the minor would be volunteering at the machine shop.

In sum, we determine that substantial evidence supports a finding that the minor has the ability to pay the fine which, with penalty assessments, totaled $146.

Juvenile Court's Consideration of the Minor's Ability to Pay

The minor argues that even if there is sufficient evidence of his ability to pay the fine and penalty assessments of $146, the juvenile court "failed to consider the issue." The minor asserts that the "court misapprehended the finding which it was required to make. Instead of focusing on [his] ability to pay, the court determined only that [his] parents had the ability to pay."

As we have stated, the minor acknowledges that he did not raise this objection below, and we will address the merits of the issue in response to his contention that the failure of his counsel to assert an objection on this ground constituted ineffective assistance.

At the disposition hearing, the juvenile court stated that it had "read and considered the probation officer's report" and that it was "going to adopt the recommendations of the probation officer in their entirety." The probation officer's report does not contain an analysis or finding regarding the minor's ability to pay but does contain the recommendation "*that it be found that* [*the*] *minor has the financial ability to pay*." (Italics added.) The court did not make an express finding regarding the minor's ability to pay at the disposition hearing, but it did question the minor's parents concerning their ability to pay fines and fees and found that they had the ability to pay.

Without deciding whether the juvenile court's adoption of the probation officer's recommendation constitutes an express finding regarding the minor's ability to pay, we determine that the record supports an implied finding by the court.

First, we observe that the neither section 730.5 nor section 731 requires an express finding by the juvenile court of the minor's ability to pay. In the absence of such a requirement "we will not do so by judicial fiat. [Citation.] Rather, we shall apply the usual presumption that official duty has been regularly performed. (Evid. Code, § 664.)" (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1485-1486, fn. omitted [analyzing an ability-to-pay requirement for a restitution fine under former Government Code section 13967, subdivision (a)].) In other words, "[w]e may infer that the trial court made all findings necessary to support its decision." (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377.)

Second, nothing in the record suggests that the presumption "that official duty has been regularly performed" (Evid. Code, § 664) should not be applied in this case. The juvenile court expressly stated that it had "read and considered the probation officer's

report." We may assume that the court understood the need to find an ability to pay on the minor's part, as this finding was specifically recommended in the probation officer's report. We also observe that although the probation officer's report contained a recommendation that the parents be "ordered to appear . . . before a financial officer from the Department of Revenue for an evaluation of the ability . . . to pay certain reimbursable costs," the juvenile court itself evaluated the parent's ability to pay at the disposition hearing and made the express finding that they had the ability to pay fines and fees. Thus, the record reflects that the court independently considered the probation officer's recommendations and, when it disagreed with a recommendation, acted or ordered otherwise. On this record, we are unable to conclude that the court failed to make a finding regarding the minor's ability to pay.

The minor argues that "a sentencing court may not comply with its duties by incorporating the probation report as its own findings," citing *People v. Pierce* (1995) 40 Cal.App.4th 1317 (*Pierce*). *Pierce*, however, involved a trial court's failure to state reasons for imposing upper terms of imprisonment. The Court of Appeal observed that former rule 420(e) of the California Rules of Court required the trial court to orally state on the record the reasons for selecting an upper term. (*Id.* at pp. 1319-1320.) In contrast, as we have explained in this case, neither section 730.5 nor section 731, subdivision (a)(1) requires an express finding by the juvenile court of the minor's ability to pay.

The minor also suggests that an express ability-to-pay finding is required by *Steven F.*, *supra*, 21 Cal.App.4th 1070, which discussed former section 730.6, subdivision (b). However, in *In re Enrique Z.* (1994) 30 Cal.App.4th 464, the Fifth Appellate District, which also decided *Steven F.*, stated that "*Steven F.* is *not* authority for the proposition that before imposing a section 730.6, subdivision (b) restitution fine, a court is required to consider, on the record, the minor's ability to pay." (*In re Enrique Z.*, *supra*, 30 Cal.App.4th at p. 468, italics added.)

In view of the minor's failure to show that the juvenile court did not consider his ability to pay, we conclude that it is not reasonably probable that he would have obtained a more favorable result had counsel raised the issue in the juvenile court. Accordingly, the minor fails to establish his claim for ineffective assistance of counsel. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 [to prevail on claim of ineffective assistance of counsel, defendant must show that "counsel's deficiencies resulted in prejudice"].)

Predisposition Custody Credits

The juvenile court gave the minor credit for time served of 58 days. On appeal, the minor contends he is entitled to five additional days of credit, for a total of 63 days, reflecting the time period between his arrest on February 3, 2009, and the dispositional hearing on April 6, 2009. The Attorney General concedes the issue. We find the concession appropriate.

Section 726, subdivision (c) provides that a "minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." "Because an adult would be entitled to presentence custody credit under Penal Code section 2900.5, this has been interpreted to mean that an equivalent amount of time must be subtracted from a minor's maximum period of physical confinement. [Citations.]" (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 352.) Thus, "a minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.]" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

In this case, the record reflects that the minor was arrested on February 3, 2009. He was "credited with 29 days secure custody time" as of March 3, 2009, by San Mateo County Superior Court.

By order dated March 3, 2009, San Mateo County Superior Court ordered the minor's case transferred to Santa Clara County. The minor was still detained at that time and was to be "transported in custody to the receiving county within seven judicial days."

On March 9, 2009, Santa Clara County Superior Court received the minor's file from San Mateo County Superior Court. Reports filed thereafter by the probation officer in Santa Clara County Superior Court state that the minor was in custody since March 9, 2009.

It appears that the probation officer calculated credit for time served as 58 days based on the following: 29 days, reflecting the amount credited by San Mateo County Superior Court from the date of the minor's arrest *through March 3, 2009*, plus 29 days for the time spent in custody in Santa Clara County *from March 9, 2009*, the date that Santa Clara County Superior Court received the minor's file, to the date of the disposition hearing on April 6, 2009.

There is nothing in the record, however, to indicate that the minor was released from custody between March 3 and 9, 2009, while his case was being transferred from San Mateo County to Santa Clara County. Taking the days between those dates into account (March 4, 5, 6, 7, and 8), the minor should have received an additional 5 days of credit beyond the 58 days awarded, for a total of 63 days. Accordingly, we will modify the juvenile court's order of April 6, 2009, to include an award of 63 days of predisposition custody credits, rather than 58 days.

DISPOSITION

The April 6, 2009 order is ordered modified by adding 5 days of predisposition custody credits, for a total award of 63 days. As so modified, the order is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MCADAMS, J.

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DUFFY, J.